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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92053355
Party	Defendant Wyman Von Mohr & Associates
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UNITED STATES PATENT AND TRADEMARK OFFICE  
TRADEMARK TRIAL AND APPEAL BOARD

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STRIKE KING LURE COMPANY,	:	
	:	
Petitioner,	:	Cancellation No. 92,053,355
	:	
vs.	:	
	:	
WYMAN VON MOHR & ASSOCIATES,	:	
	:	
Registrant.	:	

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**REPLY MEMORANDUM OF LAW IN SUPPORT OF  
REGISTRANT'S MOTION TO COMPEL DISCOVERY  
AND PRETRIAL DISCLOSURES**

Registrant Wyman Von Mohr & Associates ("Registrant" or "Wyman") files this Memorandum Of Law in reply to the "Precautionary Response Of Petitioner Strike King Lure Company To Registrant's Memorandum Of Law In Support Of Registrant's Motion To Compel Discovery And Pretrial Disclosures" (the "Response"). As set forth herein, Petitioner Strike King Lure Company's ("Petitioner" or "Strike King") Response is untimely, and incorrectly claims that Wyman's motion to compel is premature and moot.

If the nonmoving party has not given its consent to a motion, but does not file a brief in opposition during the time allowed therefor, "the Board, in its discretion, may grant the motion as conceded." TBMP § 502.04 (citing 37 C.F.R. § 2.127(a)). Here, Wyman's motion to compel was filed on April 5, 2012, with service by U.S. Mail, thus making Strike King's response due 20 days after service, or by April 25, 2012. TBMP § 502.02(b). Strike King's response was not filed and served until April 27, 2012, however, two days after the deadline. Particularly here, where Strike King's delays have caused prejudice to Wyman, which has been seeking a resolution of this proceeding since it began more than a year and a half ago, the Board should

exercise its discretion to disregard Strike King's response and grant Wyman's motion in its entirety.

In any event, the points in Strike King's Response lack merit. Strike King takes issue with not being served with a separately designated "Motion to Compel"; yet, the Rules of the TTAB specifically state that "[e]very motion must embody or be accompanied by a brief". TBMP § 502.02(b) (citing 37 C.F.R. § 2.127(a)). Wyman's motion and brief were contained within the same document, as allowed by TBMP § 502.02(b), and were sufficient to have placed Strike King on notice of Wyman's motion and the relief that Wyman was seeking.

Strike King's assertion that Wyman's motion is premature is also incorrect. Under TTAB Rules, a motion to compel must be filed before the first testimony period opens, or it will be deemed untimely. TBMP § 523.03 (citing 37 C.F.R. § 2.120(e)). The first testimony period was scheduled to open on April 6, 2012 (*see* July 11, 2011 Motion For Suspension setting May 6, 2012 as close of Petitioner's 30-day trial period), thus making any motion to compel due thirty days before, or on April 5, 2012. Not having received Strike King's discovery responses by the close of business on April 5th, Wyman had no choice but to file its motion in order to preserve its rights.

Contrary to Strike King's assertion, Wyman's motion is not moot. The parties are still negotiating the terms of the settlement agreement. Although Wyman, like Strike King, is hopeful that the matter will be settled, that is not a certainty until an agreement is executed. Wyman's motion was intended, appropriately, to preserve its rights in the event that the matter does not settle for some reason.

Wyman's motion is also not moot because Strike King failed to provide its Pretrial Disclosures, due March 22, 2012, and did not move for an extension of the date within which to

do so.<sup>1</sup> In addition, the discovery responses served by Strike King late in the evening of April 5<sup>th</sup> and into the early hours of April 6<sup>th</sup> assert various objections, but Strike King waived its right to interpose any such objections when it delayed four weeks in responding to the discovery. *See* TBMP § 403.03 (in absence of excusable neglect, party failing to respond to timely-served discovery may be found to have forfeited right to object to discovery on the merits). The health issues of Strike King's counsel's mother and the temporary loss of this case file are unfortunate, but insufficient to justify Strike King's long delay in responding to Wyman's discovery requests.

As a result of the foregoing, Strike King should be deemed to have waived any objections to the merits of Wyman's discovery requests, and Wyman's motion to compel should be granted.

### **CONCLUSION**

For the reasons set forth above and in Registrant's initial Memorandum of Law, Registrant's motion to compel discovery and the service of pretrial disclosures should be granted, Registrant should be deemed to have waived all rights to object to the discovery requests on the merits, and Petitioner should be directed to produce all documents and information by a date certain, after which the proceeding should be dismissed and judgment entered in Registrant's favor.

Dated: May 17, 2012

/s/ Lisa A. Ferrari  
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<sup>1</sup> Notably, the Order of the Board suspending the proceedings pending disposition of Wyman's motion to compel made clear that "[t]his suspension order does **not** toll the time for either party to make any required disclosure. . . ." April 18, 2012 Order [emphasis in original].

**CERTIFICATE OF ELECTRONIC FILING**

I hereby certify that on May 17, 2012, a copy of the foregoing **REPLY MEMORANDUM OF LAW IN SUPPORT OF REGISTRANT'S MOTION TO COMPEL DISCOVERY AND PRETRIAL DISCLOSURES** is being electronically filed with the United States Patent and Trademark Office, Trademark Trial and Appeal Board at <http://estta.uspto.gov>.

/s/ Lisa A. Ferrari \_\_\_\_\_

**CERTIFICATE OF SERVICE**

I hereby certify that on this 17th day of May, 2012, a true and correct copy of the foregoing **REPLY MEMORANDUM OF LAW IN SUPPORT OF REGISTRANT'S MOTION TO COMPEL DISCOVERY AND PRETRIAL DISCLOSURES** was served by electronic delivery, on consent, on the following attorney of record:

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